Supreme Court, U.S.
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No. 96-185

In The

Supreme Court of the United States

October Term, 1995

ELPIS SAKARIA and JACK AND LILLIAN HILLMAN,

Petitioners,

vs.

DARE COUNTY BOARD OF EDUCATION,

Respondent.

On Petition for Writ of Certiorari to the North Carolina Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent submits that the question presented that accurately characterizes the proceedings below is as follows:

Whether, consistent with the division of powers established by Article I and the Tenth Amendment to the United States Constitution, a state court may interpret the meaning and scope of that state's own condemnation statute, when the condemnor seeks to condemn land that it will use for wetlands mitigation and fill.

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Respondent requests that the Court deny the petition for writ of certiorari seeking review of the judgment of the North Carolina Supreme Court entered on February 9, 1996.

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). The question presented for review in the petition was never presented to the North Carolina courts. *See* below.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

N.C. Gen. Stat. § 115C-517 is printed in Pet. App. F.

28 U.S.C. § 1257(a) is set out at Resp. App. A.

Article III, Section 2 of the United States Constitution is set out at Resp. App. A.

United States Constitution, Amendment X is set out at Resp. App. A.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

Respondent Dare County Board of Education (board), is a local school board in Dare County, North Carolina. Pet. App. 3c. It operates the Cape Hatteras School (the school), a public school in Buxton, Dare County, North Carolina, that serves children from kindergarten through 12th grade. *Id.* The

school is located on the soundside of the Outer Banks, a long narrow strip of land separating the Pamlico Sound from the Atlantic Ocean. The school campus comprises 18 acres, 17 acres less than the site standards set by the State of North Carolina (the state) and the Southern Association of Secondary Schools and Colleges (the association). Pet. App. 3c-4c. The school obtained accreditation from the state under a waiver. The school board is a local public condemnor under North Carolina law. *Id.*

In 1985 the school board began to investigate the feasibility of constructing recreational fields on a 12.5 acre lot, owned by the board, just west and adjacent to the academic campus. Pet. App. 2b-3b. Approximately 3.1 acres of the 12.5 acre lot was comprised of wetlands, and thereby within the jurisdiction of the United States Army Corps of Engineers (Corps) and the North Carolina Department of Environment, Health and Natural Resources, Division of Coastal Management (Coastal Management), and subject to numerous state and federal regulations. Pet. App. 3b. The board sought to bulkhead and fill the wetlands on its 12.5 acre tract for ballfields, and hence needed a dredge and fill permit from the Corps.

As part of the permit application process the board had to first obtain a "consistency determination" from Coastal Management. Coastal Management rejected the board's first application "because [the board's] proposal would result in an unacceptable loss of wetlands." Pet. App. 3b. A second application was also denied in 1992. *Id.*

After Coastal Management rejected the board's first application, the board formed an ad hoc committee to find alternative sites for the proposed athletic fields and/or wetland mitigation. Forty-one sites were considered. All were found to

be unsuitable both for the facility itself and as mitigation property. Pet. App. 5c. The committee returned to the original focus on its own land and petitioners' adjoining lots. Pet. App. 6c.

The petitioners owned six undeveloped and unimproved lots, rectangular in size (approximately 75' x 300' each). The lots were bound on three sides by school board property and the fourth by the Pamlico Sound. R.259, Pet. App 3g. Approximately 90% of lots 5 and 6 were comprised of jurisdictional wetlands. R. 287, *see* Pet. App. 7c. Access to the lots was by a deeded right of way over school board property. R. 10.

The board reduced the planned size of its facility and reconfigured the location of the fields. Pet. App. 5c. The new plan provided for a baseball field primarily on the board's adjoining tract and the right of way, and a combination football/ soccer/softball field on its present field, part of the right of way to petitioners lots and the high ground of four of petitioners' six lots. Pet. App. 6c. The remaining two lots, the subject of the petition, would have no access to a public road and be virtually valueless, even if not utilized by the project for wetland mitigation and fill. *See* Pet. App. 8c. The board planned to convert the small amount of high ground on those lots, consisting of approximately a total of one-half an acre, to wetlands to partially offset the wetlands filled for the baseball field. Respondent has included as Appendix B a site development plan, R. 287. The board's land provided the remaining 1.3 acres of high ground necessary for mitigation. Pet. App. 4b. In addition, the board planned to utilize petitioners' land for teaching and educational programs. Pet. App. 8c.

As before, the board was required to obtain a permit to fill

jurisdictional wetlands. A permit application was submitted on February 15, 1993, that included the use of petitioners' lots as stated above. The board filed condemnation complaints in the trial court on February 19, 1993. On August 6, 1993, the board received a Corps permit to construct bulkheads and fill wetlands in accordance with the permit application subject to several conditions. Pet. App. 10c.

On January 24, 1994, the trial court conducted a bench trial on whether the board had the statutory authority to condemn petitioners' land for the purposes intended. The trial court concluded that petitioners' land was necessary for the construction of school facilities and that condemnation authority for the uses proposed for petitioners' land was clearly implied in state law. Pet. App. 14c.

Petitioners appealed. The court of appeals articulated the questions for review:

> The issues presented are (I) whether N.C. Gen. Stat. Section 115C-517 permits a local board of education to condemn land solely used as wetlands mitigation and a source of fill; and (II) if so, whether plaintiff's action of condemning lots 5 and 6 as necessary to build athletic facilities was an arbitrary abuse of discretion. Pet. App. 7b.

In its decision, the unanimous court held that the board has discretion to determine what land constitutes a "suitable site" for athletic facilities and what land is "necessary" for that construction, ". . . which may, depending on the circumstances of a particular case, encompass more than the actual land on which the athletic facility sits." Pet. App. 8b. Upon further appeal the North Carolina Supreme Court affirmed per curium. Pet. App. 2a.

On April 15, 1996, the issue of just compensation for the taking of petitioners' land, including lots 5 and 6, was tried by jury. Final judgment on the verdict, costs, and interest was filed in the trial court on June 7, 1996. On June 17, 1996, respondent paid the judgment amount, plus costs and interest into the office of the Dare County Clerk of Superior Court. As provided by North Carolina law, it obtained a discharge and the judgment was cancelled and released of record. On June 21, 1996, petitioners withdrew the sums paid in satisfaction of their judgment, including for lots 5 and 6. Thereafter petitioners filed their petition for writ of certiorari in this Court.

B. Correction of Misstatement of Facts and Law in Petition.

The Court is referred to the foregoing statement as providing a more balanced and accurate recitation of the procedural background and the salient facts. Judge Greene of the North Carolina court of appeals accurately summarized the relevant evidence at trial and more importantly, clearly stated the question presented for decision by the court. Pet. App. 7b. Judge Greene's entire opinion is presented as Appendix B to the petition. In addition, Judge Tillett, the trial judge who heard the evidence, entered 51 findings of fact. His judgment is reproduced as Appendix C to the petition.

The most significant misstatement in the petition is at its core — the question presented to and the decision of — the North Carolina courts. Page seven of the petition includes the following:

> The constitutional question presented here — whether a state court may rely on the assumed dictates of federal law to expand state regulatory authority without violating

the constitutional division of powers principles — was properly raised below.

This Court can search the opinions and orders of the state courts, as well as the briefs and memoranda of counsel filed therein, and will not find a hint of discussion, debate or decision of that question. Petitioners have distorted the actual issues and holdings below so to create a constitutional argument that did not previously exist.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONERS' ARGUMENTS.

A. The Question Presented Was Not Decided Below.

Petitioners argue that the North Carolina courts have "decreed" that a school board may rely on federal regulations for authority to condemn private property. Pet. 3, 7. From that erroneous assertion, petitioners then present to this court the question of whether that non-existent decision violates the separation of powers doctrine. Pet. i. Petitioners' question presented for review was never decided, briefed, presented, noted, nor probably even thought of by any of the three North Carolina courts that considered this case or by either party heretofore.

The constitutional validity of a federal or state statute was not questioned by either party or decided by the North Carolina courts. *See* foregoing statement and opinions below. Pet. App. A, B and C. Neither was nor is it claimed that a state law conflicts with a federal statute or treaty. Finally, petitioners do not assert any title, right, privilege, or immunity under the Constitution, treaties or statutes of the United States.

The question raised by petitioners does not present a case arising under the Constitution or statutes of the United States nor does it present any other basis for the exercise of this Court's judicial power authorized in Article III, Section 2 of the United States Constitution.

This case is and was a garden variety question of the interpretation of a state statute by a state court. There was no issue of federal law raised or decided by the North Carolina courts. Petitioners' erroneous description of the holding below — that a state court may rely on a federal statute to condemn private property — should not raise a cognizable basis for jurisdiction under 28 U.S.C. § 1257(a).

This Court refuses to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in the state court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing judgments of state courts under 28 U.S.C. § 1257, the Court will refuse to consider claims that were not raised or addressed below).

B. This Case Is Moot.

Petitioners have accepted and received the money the jury determined was just compensation for the property condemned by respondent. *See* foregoing statement. This controversy is now moot. There is no case over which this court can properly exercise jurisdiction.

C. The North Carolina Courts Did Not Interpret Federal Law In Rendering Their Decisions.

Petitioners argument appears to be as follows: Federal law requires a permit to fill certain wetlands. One way to obtain a

permit is to create wetlands elsewhere. Petitioners' lots 5 and 6 will be utilized by respondent initially and primarily to create wetlands so that all of both lots will then be wetlands. Respondent condemned lots 5 and 6 (as well as lots 1-4). That action was upheld by every North Carolina judge that has reviewed the case. Since federal law authorizes wetland mitigation the state courts have "assumed" that federal law "dictates" that any unexpressed general condemnation authority held by a local condemnor must include authority to condemn for wetlands mitigation. Thus, the constitutional powers doctrine has been violated by the state court decision in this case. Pet. 7, 9.

The major difficulty with this argument is that the North Carolina courts did not assume the existence of any federal dictate. The issue was not raised or probably even considered by either party or any court. The issue was purely one of state statutory interpretation based upon the facts of this particular case. *See* Pet. App. B and C.

II.

THE CLEAN WATER ACT WAS NOT AN ISSUE IN STATE COURT.

The Corps' primary responsibility in this arena is to protect ecosystems rather than to become embroiled in property title disputes. Mr. Wood, respondent's consultant, testified at trial that the ". . . Corps of Engineers doesn't require that we even show that the property is owned by the applicant. The deed nor any other kind of instrument is required by the Corps." R. 242.

The holdings of the North Carolina courts did not discuss the Clean Water Act except by way of background. No *question* of federal law was raised in the lower courts, as in *Oregon v.*

Hass, 420 U.S. 714 (1975), cited by petitioners, and it is clear from the North Carolina Court of Appeals' opinion that the decision rested on state law interpretation without reference to any federal law or policy in contrast to *Michigan v. Long*, 463 U.S. 1032 (1983), also cited by petitioners. *See* Pet. App. 1b-11b.

III.

A DECISION BY THIS COURT CREATING A UNIFORMITY OF STATE CONDEMNATION LAW AS PERTAINS TO WETLAND MITIGATION WILL USURP THE POLITICAL AND JUDICIAL POWER OF THE STATES AND CONFUSE POLITICAL ACCOUNTABILITY RATHER THAN DELINEATE IT.

Petitioners' political accountability argument is difficult to understand. If one believes that wetlands should be filled without corresponding mitigation one should approach the federal agencies involved (EPA or CORPS) or one's senator or congressman. If one believes school boards should not be authorized to condemn for wetland mitigation one should seek to amend the state statute. If one believes the state judges made an erroneous decision of the law, one should seek to vote them out of office. If one believes the school board members should not have condemned petitioners' land one should seek to replace them.

Some state statutes expressly authorize condemnation for wetland creation. *See, e.g.*, Miss. Code Ann. § 65-1-51; R.R.S. Nebraska § 39-1320(2)(0). Perhaps other state courts have held that under the circumstances of the case before it and the law of that state, authority to condemn to create wetlands was not authorized. *See, e.g., dicta* in *State of Missouri v. Keevan*, 1994 Mo. App. Lexis 871, relied on by Petitioners in state court. Indeed, that is the way federalism should work — each state

determining for itself the extent of the authority granted its local condemnors.

Apparently petitioners seek to have this court dictate to the states whether or not a local public condemnor can or cannot condemn land for wetlands mitigation, regardless of the factual circumstances of the case. How this grasp of traditionally state law concern (*cf.* United States Constitution, Amendment X) will in any way promote any federal policy concerning wetlands is not explained. The federal policy, be it no net loss of wetlands, or whatever, remains intact regardless of this Court's holding.

Petitioners argue that this Court should intervene to ensure integrity of state law. Pet. 15. How a dictate from this Court imposing an interpretation of a North Carolina condemnation statute on the North Carolina courts will ensure the integrity of North Carolina law is also not explained.

It is not clear what petitioners would have this Court hold to remedy the alleged "undermining of the basic structure of our federal system". The state statute at issue, N.C. Gen. Stat. § 115C-517, is only one of several sources of statutory condemnation authority in North Carolina law. Does petitioner seek a decision of this court that will impact all other local and state condemnors, and perhaps the North Carolina Constitution, or just boards of education? Either way integrity of North Carolina law will be shaken, rather than ensured.

What remedy do petitioners' seek? They have not tendered the money they withdrew from court as just compensation. Do they seek to have the project reversed? There is no stay order in effect. Should the state courts re-litigate whether the board can condemn lots 5 and 6 for another purpose? Petitioners do not

challenge the taking of their lots 1, 2, 3 and 4 nor of the exclusive right of way to lots 5 and 6. Actually and practically there is no existing case or controversy.

CONCLUSION

For the reasons stated, this Court should not exercise jurisdiction, and the writ of certiorari should be denied.

Dated: October, 1, 1996.

Respectfully submitted,

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APPENDIX A — RELEVANT STATUTE AND CONSTITUTIONAL PROVISIONS

28 U.S.C. § 1257(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statues of, or any commission held or authority exercised under, the United States.

Art. III, Section 2, United States Constitution

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have

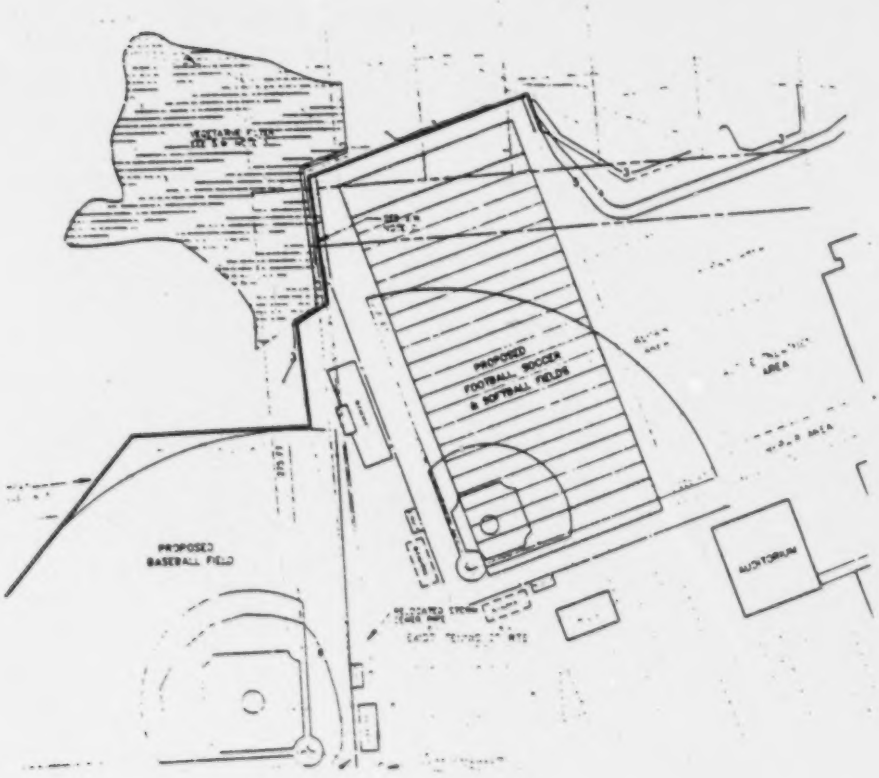
appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

United States Constitution, Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

BEST AVAIL

APPENDIX B — SITE DEVELOPMENT PLAN



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